

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33369

STATE OF IDAHO,)	2009 Unpublished Opinion No. 459
)	
Plaintiff-Respondent,)	Filed: May 11, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
HOLLIE LYNN KERR,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Franklin County. Hon. Don L. Harding, District Judge.

Order revoking probation and imposing sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Sara B. Thomas, Chief, Appellate Unit, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Rebekah A. Cudé, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Hollie Lynn Kerr appeals from the order of the district court revoking probation and imposing sentence. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

In October 2003, Kerr stole prescription medication from the home of a friend. Kerr entered a plea of guilty to burglary, I.C. § 18-1401, in March 2004, and was released to attend an inpatient treatment facility in Utah. In July 2005, Kerr was brought back before the district court for sentencing. The parties and the district court agreed to place Kerr on probation for five years and a withheld judgment was entered. The parties and the district court also agreed that, because Kerr was receiving a withheld judgment, there was no need to order a presentence investigation report (PSI).

A report of a probation violation was filed against Kerr in January 2006. At the hearing on the probation violation, the parties agreed that Kerr needed a mental health evaluation. Kerr appeared before the district court in May 2006 for a hearing on the probation violation and another report of a probation violation that was filed earlier in May. Kerr admitted to violating several terms of her probation. The district court held a probation disposition hearing on July 13, 2006. At that hearing, the district court revoked Kerr's withheld judgment and probation; entered a judgment of conviction; and imposed a unified sentence of five years, with a minimum period of confinement of two years. Kerr appeals.

II.

ANALYSIS

A. Presentence Investigation Report

Kerr argues that the district court erred by failing to order a PSI, that the record does not affirmatively show why a PSI was not ordered, and that the information before the court was not adequate to meet the requirements of I.C.R. 32. As a predicate to appellate review of the information contained in a PSI, the defendant bears the burden of raising objections to the PSI at the time of sentencing. *State v. Lamas*, 121 Idaho 1027, 1028, 829 P.2d 1376, 1377 (Ct. App. 1992). Where no objection is made and the PSI substantially meets the requirements of I.C.R. 32, we will not review a challenge to its contents raised for the first time on appeal. *Id.* An exception to this rule is that where manifest disregard for the provisions of Rule 32 is shown, questions concerning the PSI may be reviewed on appeal even if no objection was made below. *State v. Viehweg*, 127 Idaho 87, 91, 896 P.2d 995, 999 (Ct. App. 1995).

Idaho Criminal Rule 32(a) provides:

The trial judge need not require a presentence investigation report in every criminal case. The ordering of such a report is within the discretion of the court. With respect to felony convictions, if the trial court does not require a presentence investigation and report, the record must show affirmatively why such an investigation was not ordered.

In addition to an attempted distribution of a controlled substance charge from Utah, Kerr has a prior burglary conviction in Idaho. That prior burglary conviction was in 1999 and the PSI from that case shows that the same judge handled both that case and the instant one. The PSI from 1999 also contains an addendum prepared by the Department of Corrections during Kerr's retained jurisdiction in 2000.

In this case, Kerr entered a guilty plea to burglary in March 2004. However, before Kerr was sentenced she was released to attend a rehabilitation center in Utah. Over a year later and after successfully completing the inpatient portion of that program, Kerr was granted a withheld judgment and placed on probation. At the sentencing hearing, the district court noted that it did not need to order a PSI because Kerr was receiving a withheld judgment.

Kerr admitted to violating several of the conditions of her probation by twice stealing prescription medications and lying to staff at her treatment facility so she could spend the weekend with a male patient. At the end of the probation violation hearing, the following exchange occurred:

THE COURT: But now do we have a Presentence Report? I think we do, don't we?

[THE STATE]: I believe there was one prepared initially, but my question is, does the Court want to have a supplement or--I just want to make sure we were prepared, so when we got here on June 8th, we wouldn't have to postpone it again.

THE COURT: Well, if we have a Presentence Report prepared for back then, I think we could use that. As long as counsel agreed. If we don't, I think we need to order one.

[DEFENSE COUNSEL]: It is from 1999, Your Honor, the PSI.

THE COURT: We ought to update it then, huh?

[THE STATE]: Yes.

THE COURT: Okay. The Court is going to order an updated report and so we are going to have to set sentencing approximately six weeks from today, July 13th, and we will order an updated Presentence Report.

In June 2006, the Department of Corrections employee assigned the task of preparing an updated PSI submitted a letter to the district court. In pertinent part, that letter reads:

On May 31, 2006, I was assigned Ms. Kerr's updated presentence report. Upon interviewing Ms. Kerr at the Caribou County Jail and reviewing her Idaho Department of Corrections file I found that Ms. Kerr's probation officer . . . had already detailed Ms. Kerr's performance on probation in his Report of Violation and Special Progress Report to the Court. After discussing the matter with [the district court] it was determined that an updated presentence report was not necessary. Ms. Kerr's treatments and placements in the community were well documented in [her probation officer's] reports to the Court. Therefore, I'm submitting this letter as record for the Court that the updated presentence report has been vacated.

The report of probation violation referenced in the letter is a three-page document, and the special progress report is a separate two-page document detailing Kerr's progress on probation and at various treatment centers.

The record in this case shows why a new PSI was not ordered. The parties agreed that a new PSI was not necessary, but concluded that an updated PSI should be ordered. However, it is evident from the letter of the employee assigned the task of creating an updated PSI that the district court ultimately concluded there was sufficient information before it and an updated PSI was unnecessary.

The district court that handled this case was the same judge who sentenced Kerr to a period of retained jurisdiction on her 1999 burglary conviction and ordered a PSI in that case. In addition to the 1999 PSI and the 2000 addendum from Kerr's retained jurisdiction, the district court had before it the probation violation and special progress reports from Kerr's probation officer; a progress report from the facility in Utah where she received treatment; and a mental health assessment intake form from February 8, 2006. At Kerr's sentencing on July 13, 2006, her attorney stated the "Court is fully aware of [Kerr's] addiction history and her psychological problems. I think the Court file is replete with a number of those issues and I won't belabor those." Kerr's attorney also referenced a report from a doctor and a Caribou County sheriff jail log that the district court had copies of. Additionally, the district court called the treatment center in Utah to get an update on Kerr while she was participating in that program.

Kerr argues that there is no indication in the record that the district court reviewed the PSI from 1999. Although nothing from the 1999 PSI is specifically referenced in any of the hearings, Kerr has not shown that the district court failed to review that document. The absence of an express reference to the PSI does not constitute an affirmative showing that the district court did not see the PSI. The district court was well aware of Kerr's mental health and drug addiction problems. In fact, the district court had followed Kerr's successes and foibles for approximately seven years before ultimately sending her to prison. Additionally, the district court had several reports and evaluations concerning Kerr from trained professionals. We conclude that Kerr has not shown that the district court manifestly disregarded the provisions of I.C.R. 32. Therefore, because she did not object to the sufficiency of the PSI in the trial court, we will not address the issue further.

B. Competency Finding

Kerr argues that the district court erred by revoking her withheld judgment and probation and imposing sentence without obtaining the competency evaluation that it ordered. Kerr asserts that the record demonstrates a competency evaluation was not obtained and copies of that evaluation were not provided to the parties. Kerr also argues that the district court erred by failing to enter a determination that she was competent before proceeding with the probation disposition hearing. The state contends that the district court implicitly found Kerr competent, the statute governing competency does not expressly require a formal order of competency, and that any error in the district court's failure to expressly find Kerr competent is harmless.

Idaho Code Section 18-211 governs the procedure for obtaining a competency evaluation, and I.C. § 18-212 governs the determination whether a defendant is competent to proceed in a criminal case. Idaho Code Section 18-212(4) provides, in pertinent part:

Each report shall be filed in triplicate with the clerk of the court, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant. Upon receipt of a report, the court shall determine, after a hearing if a hearing is requested, the disposition of the defendant and the proceedings against him. If the court determines that the defendant is fit to proceed, the proceedings shall be resumed.

In this case, Kerr appeared before the district court in early February 2006 for a probation violation hearing. Kerr's attorney referenced a mental health assessment intake that was completed on Kerr the day before the hearing, and her attorney requested an additional evaluation. There was further discussion between the parties and the district court regarding whether the state hospital could receive Kerr and conduct the evaluation. Ultimately, Kerr was returned to the custody of the sheriff so that an evaluation could be performed. On February 10, the district court entered an order releasing Kerr to her parents to be transported to the Portneuf Behavioral Center "for an evaluation and/or examination for purposes of determining whether [Kerr] is able to assist her counsel and understand all proceedings."

On February 17, authorities representing the State Hospital South sent a letter to the district court, the prosecutor, and Kerr's attorney. That letter began by acknowledging that the district court's order for release and examination was vacated. The letter also informed the district court and the parties that State Hospital South did not perform competency evaluations pursuant to the relevant statute.

In April, Kerr's probation officer filed a special progress report. That report explained that Kerr completed inpatient treatment at Portneuf Medical Center and then moved into the Malad Living Center, which is a residential care facility where she was receiving ongoing treatment. A report of a probation violation was filed in May. In addition to detailing Kerr's probation violation that report reads:

Ms. Kerr was brought before the Court on February 9, 2006 to answer for her behavior, but was deemed incapable of understanding the proceedings due to her physical display of mental/emotional distress. The Court ordered a mental health evaluation be conducted. The State Designated Examiner found Ms. Kerr mentally and emotionally fit, but with some assistance Ms. Kerr was admitted to the Mental Health Facility at Portneuf Medical Center in Pocatello, Idaho where she was treated and stabilized. Upon discharge, Ms. Kerr was accepted by the Malad Living Center for aftercare treatment. Ms. Kerr was to reside in the residential center in Malad, Idaho and receive counseling and therapy at the adjunct Consumer Care facility in Pocatello, Idaho.

When Kerr again appeared before the district court regarding her probation violation on May 25, 2006, there was additional discussion as to whether she was facing only the probation violation referenced in the report from May or whether she was also still facing the probation violation discussed at the February hearing. The state asserted:

I think what happened on the disposition on that one at the hearing, the admit/deny hearing, I think when Ms. Kerr came in there was some question about a mental status. The Court will recall, you ordered a mental examination. I don't think we ever did anything on that January [probation violation].

Kerr's attorney did not contest Kerr's competence or complain about the absence of an order finding Kerr competent.

Thereafter, a hearing was held in June on Kerr's motion to be released on her own recognizance or for a bond reduction, and a disposition hearing on the probation violations was held a month later. Again, Kerr did not object to the lack of a competency evaluation or the lack of an order from the district court declaring her competent to proceed. *See State v. Lovelace*, 140 Idaho 53, 62-63, 90 P.3d 278, 287-88 (2003) (applying fundamental error analysis where no objection was raised to the magistrate's failure to suspend proceedings once cause was found to subject a defendant to a competency hearing).

Even if we assume for purposes of this opinion only that the district court committed fundamental error by not entering a competency finding, the record demonstrates that such error

was harmless. Kerr had been to various addiction and mental health facilities for treatment. The report of a probation violation from May 3 notes that a mental health evaluation was ordered and that the “State Designated Examiner found Ms. Kerr mentally and emotionally fit.” Furthermore, the district court was well aware of Kerr’s mental health issues through tracking her rehabilitation progress for several years and her many appearances before the court. By proceeding to disposition on Kerr’s probation violation, the district court implicitly found Kerr competent. There is no evidence in the record on which a contrary finding could have been based. Kerr has failed to demonstrate that a mental health evaluation did not occur or that the record proves she was incompetent to proceed. Therefore, any error by the district court in failing to enter a finding of competency on the record is harmless.

C. Probation Revocation and Sentence

Kerr argues that the district court abused its discretion in revoking probation and imposing a unified sentence of five years, with a minimum period of confinement of two years, for burglary. Specifically, Kerr contends that the district court relied on the unsupported opinions of Kerr’s probation officer and that the sentence did not meet Kerr’s rehabilitative needs considering her mental health and drug addiction issues. The state asserts that “any claim related to the revocation of probation and the suitability of Kerr being incarcerated is moot” because Kerr is currently on parole. The state is incorrect. *See State v. Russell*, 122 Idaho 488, 490 n.3, 835 P.2d 1299, 1301, n.3 (1992). Alternatively, the state argues that the district court acted within the bounds of its discretion when it revoked Kerr’s probation after she continued to commit the same criminal behaviors despite being given repeated and extensive opportunities at rehabilitation.

It is within the trial court’s discretion to revoke probation if any of the terms and conditions of the probation have been violated. I.C. §§ 19-2603, 20-222; *State v. Beckett*, 122 Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992); *State v. Adams*, 115 Idaho 1053, 1054, 772 P.2d 260, 261 (Ct. App. 1989); *State v. Hass*, 114 Idaho 554, 558, 758 P.2d 713, 717 (Ct. App. 1988). In determining whether to revoke probation a court must examine whether the probation is achieving the goal of rehabilitation and consistent with the protection of society. *State v. Upton*, 127 Idaho 274, 275, 899 P.2d 984, 985 (Ct. App. 1995); *Beckett*, 122 Idaho at 325, 834 P.2d at 327; *Hass*, 114 Idaho at 558, 758 P.2d at 717. The court may, after a probation violation has been established, order that the suspended sentence be executed or, in the alternative, the

court is authorized under Idaho Criminal Rule 35 to reduce the sentence. *Beckett*, 122 Idaho at 326, 834 P.2d at 328; *State v. Marks*, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989). A decision to revoke probation will be disturbed on appeal only upon a showing that the trial court abused its discretion. *Beckett*, 122 Idaho at 326, 834 P.2d at 328.

Sentencing is also a matter for the trial court's discretion. Both our standard of review and the factors to be considered in evaluating the reasonableness of a sentence are well established and need not be repeated here. See *State v. Hernandez*, 121 Idaho 114, 117-18, 822 P.2d 1011, 1014-15 (Ct. App. 1991); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

When we review a sentence that is ordered into execution following a period of probation, we do not base our review upon the facts existing when the sentence was imposed. Rather we examine all the circumstances bearing upon the decision to revoke probation and require execution of the sentence, including events that occurred between the original pronouncement of the sentence and the revocation of probation. *Adams*, 115 Idaho at 1055, 772 P.2d at 262; *State v. Grove*, 109 Idaho 372, 373, 707 P.2d 483, 484 (Ct. App. 1985); *State v. Tucker*, 103 Idaho 885, 888, 655 P.2d 92, 95 (Ct. App. 1982).

Despite her relative youth, Kerr has made several appearances before the same district court over a period of nearly seven years and has been offered a variety of programs and opportunities to reform her behavior before being sent to prison. In 1997, Kerr was charged with felony distribution of marijuana in Utah, but pled guilty to a reduced misdemeanor charge of attempted distribution.

In 1999, Kerr was charged with burglary for stealing prescription pills from a family friend. The same judge who sentenced Kerr in this case gave Kerr the opportunity to do a period of retained jurisdiction in that 1999 case. After she successfully completed the period of retained jurisdiction, the district court placed Kerr on probation. During that period of probation, Kerr's probation officer argued strenuously on her behalf and several intervening misdemeanor charges were dismissed.

In this case, Kerr again stole prescription medication in 2003. Prosecution of Kerr was deferred, but a burglary charge was eventually filed in 2004 because of Kerr's continued failure

to obey the law. Prior to sentencing, Kerr was allowed to attend a rehabilitation facility in Utah. After successfully completing the inpatient portion of that program, Kerr was granted a withheld judgment and placed on probation. However, Kerr failed to comply with the conditions of her probation and engaged in the same destructive behavior--stealing prescription medications from others and failing to follow the rules imposed at the treatment center. The district court in this case was aware of Kerr's mental health and drug addiction issues. Furthermore, the district court had tried, albeit unsuccessfully, for several years to get Kerr the help she needed without imposing a prison sentence. At sentencing, the district court noted:

And you are correct, I was very pleased when you [came] back from the [Utah rehabilitation program] and I remember speaking with you on the phone at [the Utah program] when you were doing so well and working at the desk and you had everything going for you and we had tremendous hope for you and that is why I had given you a withheld judgment in this case and put you on probation. So it is disheartening to me that you just have not been able to take advantage of that and get your life in order. And I don't know of anything else left. I have to consider protection of society. That is the first thing I need to consider.

The district court gave Kerr numerous opportunities and ultimately concluded that Kerr needed a period of incarceration to protect society. Applying the foregoing standards, and having reviewed the record in this case, we cannot say that the district court abused its discretion either in revoking probation or in ordering execution of Kerr's original sentence without modification.

III.

CONCLUSION

The district court did not disregard the requirements of I.C.R. 32. The record demonstrates that any error by the district court in failing to enter a finding of competency on the record is harmless. or abuse its discretion in revoking Kerr's probation and imposing her original sentence. Therefore, the district court's order revoking probation and directing execution of Kerr's previously suspended sentence is affirmed.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**